

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI**

**FEDERAL TRADE COMMISSION,**

Plaintiff

V.

Case No. 4:20-CV-00317

**PEABODY ENERGY CORPORATION,**

and

**ARCH RESOURCES, INC.**

Defendants.

**MEMORANDUM IN SUPPORT OF MOTION OF  
NON-PARTY DAIRYLAND POWER COOPERATIVE  
FOR *IN CAMERA* TREATMENT  
OF CONFIDENTIAL DOCUMENTS AND INFORMATION**

In accordance with Paragraph 10 of the April 3, 2020 Modified Protective Order in this proceeding [Doc. 110], Non-Party Dairyland Power Cooperative (“Dairyland”) hereby submits this Memorandum in Support of its Motion for *In Camera* treatment of its confidential documents and information.

## BACKGROUND

On June 25, 2020, Dairyland received notice from Defendants, Peabody Energy Corporation (“Peabody”) and Arch Resources, Inc. (“Arch”), confirming that the Defendants’ exhibit list included certain documents Dairyland had produced in discovery.

The Defendants' notice listed a total of seven (7) documents. Six (6) of those documents include Confidential, commercially sensitive Dairyland information.

**Dairyland Documents Appearing on Defendants' Exhibit List:**

DEF EX NO	DESCRIPTION	CONFIDENTIALITY CONCERN
DX7019	2/3/20 Arch Letter re Coal Price Discount	Contains competitively sensitive information relating to coal pricing
DX7020	2/3/20 Peabody Letter re Coal Price Discount	Contains competitively sensitive information relating to coal pricing
DX7036	1/23/20 Genoa Station #3 Retirement -- Key Messages For Dairyland Directors and DMA	Contains competitively sensitive information relating to economic analyses and modeling relating to forecasting plant generation and dispatch requirements
DX7037	Modeling for NERA Analysis	Contains competitively sensitive information relating to economic analyses and modeling relating to forecasting plant generation and dispatch requirements
DX7038	6/3/19 NERA Genoa Station #3 Retirement Decision Analysis Overview of Key Probabilistic Results	Contains competitively sensitive information relating to economic analyses and modeling relating to forecasting plant generation and dispatch requirements
DX7039	Seasonal Operation Modeling Results	Contains competitively sensitive information relating to economic analyses and modeling relating to forecasting plant generation and dispatch requirements

**ARGUMENT**

**A. Legal Standard**

In the Eighth Circuit, the right of access to judicial records “is not absolute,” and “requires a weighing of competing interests,” as courts in this Circuit do not “recogniz[e] a ‘strong presumption’ favoring access.” *Webster Groves Pub. Sch. Dist. v. Pulitzer Publ’g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990). In determining whether to seal judicial records in a civil case, Courts balance “the degree to which sealing a judicial record would interfere with the

interests served by the common-law right of access” against “the salutary interests served by maintaining confidentiality of the information sought to be sealed.” *IDT Corp. v. eBay*, 709 F.3d 1220, 1223 (8th Cir. 2013).

This balance tips even more in favor of the protection of confidential information that has been produced by third parties in FTC merger challenges. In particular, courts zealously protect the commercial secrets of third parties who disclose information in connection with such challenges. *See, e.g., FTC v. Advocate Health Care Network*, 162 F. Supp.3d 666, 671-672 (N.D. Ill. 2016) (“we are not talking about an exchange of documents between two sides in a lawsuit. We are talking about a number of third parties, not targets of any FTC action, who had to give up exceedingly confidential information in response to a government subpoena.”).

**B. Protection of Dairyland’s Documents and Information is Appropriate**

The information that Dairyland has designated as Confidential includes competitive (and secret) documents relating to: (1) Dairyland’s confidential and competitively sensitive coal supply pricing terms; (2) Dairyland’s confidential and competitively sensitive information relating to its decision to retire Unit 3 of its Genoa Coal-fired Generating Station; and (3) Dairyland’s confidential and competitively sensitive information relating to economic analyses and modeling relating to forecasting plant generation and dispatch requirements. Much of this information relates to commercially sensitive information that includes confidential cost and pricing information derived from, or revealing, information contained in contracts with confidentiality restrictions and/or that previously has been filed under seal with the Wisconsin Public Service Commission and/or the State of Minnesota.

The public disclosure of this information would be commercially harmful for Dairyland. As had been the case in *FTC v. Advocate Health Care Network*, *supra*, the Dairyland documents

include “exceedingly confidential information” produced “in response to a government subpoena” and in response to Defendants’ subpoena.

### CONCLUSION

For the reasons set forth herein, Dairyland respectfully requests that the Court require *In Camera* treatment for the listed Exhibits.

Respectfully submitted,

/s/ Frank J. Pergolizzi

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*Attorneys for Dairyland Power Cooperative*

Dated: July 1, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1st day of July, 2020, the foregoing Motion for *In Camera* Treatment was filed electronically with the Clerk of Court using the CM/ECF System, to be served upon all counsel of record via transmission of a Notice of Electronic Filing through the CM/ECF System.

/s/ Frank J. Pergolizzi

Frank J. Pergolizzi

*An Attorney for Dairyland Power Cooperative*